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No. 86-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BENJAMIN PERLMAN,

Petitioner,

v.

CITY OF CHICAGO, ROBERT TRUSZ AND WILLIAM DEVONEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Fourth Amendment permit police officers, who are executing a search warrant authorizing the seizure of eight allegedly stolen items from a jewelry store, to seize more than 900 pieces of new and used jewelry to determine whether any of the items not named in the warrant were stolen?

2. Is a police officer, who concedes that he was accompanied while executing a search warrant by an informant and two burglary victims "solely for the purpose of identifying non-warrant items" entitled to claim that discovery of non-warrant items was "inadvertent?"

3. Is the plaintiff in a civil rights action who claims a police officer secured a search warrant by making material false statements required to make the "substantial preliminary showing" of *Franks* v. *Delaware*, 438 U.S. 154 (1978) before trial?

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v.

CITY OF CHICAGO, ROBERT TRUSZ AND WILLIAM DEVONEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 10, 1986.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-13) is reported at 801 F.2d 267 (7th Cir. 1986). The opinion of the district judge (App. 16-26) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 14) was entered on September 10, 1986; petitioner's timely petition for rehearing was denied by the court of appeals on October 6, 1986. (App. 15.)

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case arises from the execution of a search warrant by Chicago police officers at plaintiff's jewelry store. The warrant (App. 27) authorized the seizure of a camera and seven items of jewelry. The officers, acting at the direction of respondent Devoney, arrested petitioner and seized more than nine hundred pieces of new and used jewelry. (App. 17.) A total of 883 items were eventually returned to petitioner (App. 10 n.1), who was acquitted of criminal charges. (App. 3.)

The warrant had been secured by respondent Trusz on the basis of alleged confessions by two burglars. In the warrant affidavit (App. 28-32), Trusz recited that Mary Buckman, one suspect, had confessed to five burglaries and that

Buckman had told the police that she had given the stolen items to Mark Bertucchi, the other suspect.[1] (App. 29-31.) According to Trusz, Bertucchi admitted receiving the stolen items from Buckman and had confessed to selling those items at petitioner's jewelry store. (App. 30.)

Bertucchi and two burglary victims accompanied the officers to execute the warrant on March 27, 1982.[2] The citizens, who had been told by the officers "to look to see if there was anything that we could identify" (Tr. 767), pointed out four items (Devoney Testimony, Tr. 636-37) which had not been enumerated in the warrant. Bertucci pointed out an additional three or four non-warrant items. (Tr. 639) The officers executing the warrant then seized more than 900 pieces of jewelry and scrap gold and arrested petitioner and his manager.[3]

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1. Trusz averred in the warrant affidavit that Buckman claimed to have committed "numerous other burglaries, but was presently unable to give any locations of the occurrences." (App. 30.) The statement by the court of appeals (App. 2) that Buckman had confessed to "some 100 burglaries" is not supported by anything in the warrant affidavit.

2. In opposing petitioner's motion for summary judgment, respondents' attorney conceded that the officers had brought along the informant and burglary victims "solely for the purpose of identifying non-warrant items." The court of appeals held that this concession was not binding on respondents (App. 6-7) and "did not preclude a finding that the used jewelry not listed in the warrant was inadvertently discovered." (App. 7.)

3. The district court found that in ordering the seizure of the 900 items, respondent Devoney "did not believe all of the seized items were stolen." (App. 24.) The court of appeals refused to accept this finding (App. 8) and made several *de novo* findings about execution of the warrant.

Bertucci was released because of insufficient evidence the day after the warrant had been executed. (App. 23.) Bertucci was rearrested two days later.

On March 29 and 30, 1982, Chicago police officers displayed the property seized from plaintiff to persons whose names were on file as burglary victims. (App. 3.) Ten burglary victims claimed a total of 31 items from among the more than 900 items which had been seized from plaintiff. Thereafter, the property was displayed to the public at large at a well publicized "property showup." (App. 17.) None of plaintiff's jewelry was identified as "stolen" at the showup.[4]

The court of appeals found that during execution of the warrant, one of petitioner's employees "attempted to 'palm' one of the rings but was spotted by Sergeant Devoney and ordered to return the ring." (App. 2.) Petitioner's testimony was to the contrary and this factual dispute was not specially submitted to the jury. The court of appeals also found that "[o]ne of the burglary victims accompanying the officers later identified the [palmed] ring as stolen." Id. This finding is not supported by the testimony of the burglary victim. (Tr. 702-14.) The court of appeals also found that petitioner "agreed to allow the officers to take the used jewelry to a police station so that they could inventory each item and attempt to ascertain which items were stolen." (App. 3.) Petitioner flatly denied having entered into any such "agreement."

4. Although the court of appeals described the record as "muddled" about returns at the property showup (App. 3), the documentary evidence is clear and unambiguous that nothing was identified as "stolen" after March 30, 1982. (Tr. 540-42.)

The remaining items remained in police custody.[5]

After he had been acquitted of criminal charges, plaintiff filed this lawsuit under 42 U.S.C. §1983, claiming that the search warrant had been secured on the material misstatements of respondent Trusz, that the warrant had been executed in an unlawful manner, and that the police had not returned all of the seized items.

After the completion of discovery the parties filed cross motions for summary judgment. The district court granted summary judgment against plaintiff on his claim against respondent Trusz and held that a trial was required on plaintiff's claim against respondent Devoney and the City of Chicago. (App. 16-26.)

In the view of the district court, plaintiff's challenge to the veracity of the warrant affidavit required "a substantial preliminary showing that any alleged false statements made in the affidavit by officer Trusz were made in knowing or reckless disregard of the truth." (App. 22-23.) The district court found that plaintiff's evidence that Bertucchi had been "released due to a lack of evidence on the day after the warrant was issued" (App. 23) did not meet this standard.

As to execution of the search warrant, the district judge noted that the officers had seized over 900 items and found

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5. Some of the items were returned to petitioner during the state criminal proceedings (App. 3); other items remained in police custody until their return was ordered by the district court. (App. 4.)

that respondent Devoney had admitted that "he did not believe all of the seized items were stolen." (App. 24.) The district judge concluded that while "plaintiff is undoubtedly entitled to judgment concerning some of the subject 900 items, it is impossible to tell which ones from the present record" (App. 25) and denied plaintiff's cross-motion for summary judgment. (App. 26.)

At trial, plaintiff introduced evidence to establish the liability of the City of Chicago[6] and to prove his damages.

The defense theory of the case was that the officers had lawfully seized each of the non-warrant items because "it is our duty to determine whether it is stolen or not." (Defense closing argument, Tr. 843.) The jury found in favor of defendants.

On appeal, the Seventh Circuit held that the "substantial preliminary showing" of *Franks v. Delaware*, 438 U.S. 154 (1978) is applicable to civil claims. (App. 4-5.) Turning to the question of whether the non-warrant items had been properly seized under the "plain view" exception, the court of

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6. Plaintiff's principal evidence of a municipal policy came from Kenneth Curin, who had been the highest ranking member of the Chicago Police Department in the field when the warrant was executed at plaintiff's store. (Tr. 430.) Curin admitted that in his capacity as commander he had learned of the circumstances surrounding execution of the search warrant at plaintiff's store (Tr. 430), and that everything that the officers had done in execution of the warrant was consistent with the rules and regulations of the police department. (Tr. 435.)

appeals concluded that the admission of respondent's counsel that the informant and the citizens had accompanied the officers solely to identify non-warrant items was "not dispositive" (App. 6) and found that the officers had lawfully seized 900 pieces of jewelry "because there was probable cause to associate this jewelry with criminal activity." (App. 11.)

REASONS FOR GRANTING THE WRIT

-I-

This case raises important questions about the scope of the "plain view" exception to the Warrant Clause of the Fourth Amendment. The decision of the court of appeals that police officers executing a warrant authorizing the seizure of eight items from a jewelry store may lawfully seize more than 900 pieces of new and used jewelry if "there was probable cause to associate the items with criminal activity" (App. 10) affords less significance to the Warrant Clause of the Fourth Amendment than is required by prior decisions of this Court.

This Court has never permitted the "plain view" exception to the Warrant Clause of the Fourth Amendment to be used by law enforcement officials to "enlarge a specific authorization, furnished by a warrant . . into the equivalent of a general warrant to rummage and seize at will." *Texas v. Brown,* 460 U.S. 730, 748 (Stevens, J., concurring). Such a result, however, is the inevitable consequence of the construction afforded by the Seventh Circuit to the "immediately apparent" requirement of the plain view exception.

Unlike the balloon that contained "a sort of powdery substance" in *Texas v. Brown,* 460 U.S. at 735, this case involves

jewelry found in a jewelry store. While it might be difficult to conceive "of any innocent item that is commonly carried in uninflated, tied off balloons," *Texas v. Brown*, 460 U.S. at 746 (Powell, J., concurring), it is not surprising to find jewelry in a jewelry store.[7] There was nothing about the jewelry that identified it as stolen; as respondent's counsel confessed to the jury (Tr. 843), the officers had seized the non-warrant jewelry "to determine whether it is stolen or not." The court of appeals recognized that the officers did not "know for a certainty" that each of the 900 pieces of jewelry was stolen and that, at best, the officers "had a suspicion that any or all of the items could be stolen goods." (App. 10.)

A "suspicion that any or all of the items could be stolen goods" would not be enough to secure a search warrant authorizing the seizure of 900 pieces of jewelry. *Marron v. United States*, 275 U.S. 192 (1927); *Lo-Ji Sales Inc. v. New York*, 442 U.S. 319 (1979). Under the rule adopted by the court of appeals, however, the "plain view" doctrine permits a broader seizure than that which could have been authorized by a magistrate. Such a result strikes at the core of this

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7. It was of no consequence that petitioner did not have a "second-hand jewelry dealer's license." (App. 2.) Petitioner was not required to possess such a license because the ordinance requiring a second hand dealer's license is applicable only to a business (unlike petitioner's) which is predominately concerned with the sale of used goods. *Eastman v. City of Chicago*, 79 Ill. 178 (1875); *City of Chicago v. Moore*, 351 Ill. 510 (1933).

Court's Fourth Amendment jurisprudence.

"It is familiar history that the indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York,* 445 U.S. 573, 583 (1980) (footnote omitted). The specific evil of a general warrant was its authorization "of a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971).

The framers sought to outlaw general warrants in the Fourth Amendment "by requiring a 'particular description' of the things to be seized." *Coolidge,* 403 U.S. at 567; *Andersen v. Maryland,* 427 U.S. 463, 480 (1976). "This requirement 'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'" *Stanford v. Texas,* 379 U.S. 476, 485 (1965), quoting *Marron v. United States,* 275 U.S. 192, 196 (1927).

In contrast with the careful regulation of seizures completed by the Fourth Amendment, the massive seizure approved by the court of appeals is "reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect." *Lo-Ji Sales, Inc. v. New York,* 442 U.S. at 325 (1979).

The Seventh Circuit read the plurality opinion in *Texas v. Brown,* 460 U.S. 730 (1982) as authorizing a "plain view" seizure when there is "probable cause to associate [evidence] with criminal activity." (App. 10, 11.) In the view of the court of appeals, *Texas v. Brown* eliminated any requirement

that the officers have probable cause to believe that each seized item was stolen. (App. 11.) This reading of *Texas v. Brown* "appears to accord less significance to the Warrant Clause of the Fourth Amendment that is justified by the language and purpose of that Amendment." *Texas v. Brown*, 460 U.S. at 744 (Powell, J., concurring). Whether an item is seized under a warrant or under the plain view exception, there must be some way in which the officers "can distinguish between legally and illegally possessed property on the basis of objective, articulated standards." *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984).

On facts analogous to those presented here, the courts of appeals for the Third[8] Sixth,[9] and Ninth[10] Circuits have

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8. In *United States v. Waxman*, 572 F.Supp. 1136 (E.D.Pa. 1983), aff'd 745 F.2d 49 (3d Cir. 1984), the officers seized 169 non-warrant items because "they believed some of the things were stolen... They neither recognized the specific pieces nor based their decision to seize them on any evidence other than the fact that some objects were believed to be stolen." 572 F.Supp. at 1149. The court held this belief to be insufficient because "at best, the officers merely had a suspicion these [non-warrant] items were stolen rather than probable cause to believe so." Id

9. *United States v. Gray*, 484 F.2d 352, 355 (6th Cir. 1975) (warrantless seizure of automatic weapon not lawful beause the illegality of the weapon could not be determined without investigation); *United States v. Szymkowiak*, 727 F.2d 95, 98-99 (6th Cir. 1984) (same); *Donta v. Hopper*, 774 F.2d 716, 720 (6th Cir. 1985) (same)

10. *United States v. Washington*,, 797 F.2d 1461, 1469 (9th Cir. 1986) (seizure of "any item bearing a woman's name or related to women generally" not permissible absent knowledge of names of particular women).

refused to apply the "plain view" exception when it was necessary to subject seized items to identification procedures to determine if the items were subject to seizure.[11] Certiorari should be granted to review the expansive interpretation of the plain view exception adopted by the Seventh Circuit in this case.

-II-

This case also presents an important question about the contours of the "inadvertency" prong of the "plain view" exception to the Warrant Clause. In the view of the Seventh Circuit, counsel's concession that his clients had brought the informant and burglary victims to execute the search warrant "solely for the purpose of identifying non-warrant items" "did not preclude a finding that the used jewelry not listed in the warrant was inadvertently discovered."[12] (App. 7.)

The court of appeals recognized (App. 6) that the inadvertence requirement of the plain view exception is not met when "the police know in advance the location of the evidence and intend to seize it." *Coolidge v. New Hampshire,*

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11. See also *United States v. Klein,* 565 F.2d 183 (1st Cir. 1977) (generic description in search warrant insufficient absent objective standards to distinguish innocent items from those subject to seizure).

12. The conclusion of the court of appeals that counsel's admission was not binding upon his clients (App. 6-7) is flatly contrary to the general rule that "admissions in the brief of the party opposing the motion [for summary judgment] . . . are functionally equivalent to 'admissions on file' which are expressly mentioned in Rule 56(c)." 10A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2723 p.65-66.

403 U.S. 443, 470 (1971). In the view of the court of appeals, however, police officers who know that a burglar "had sold other stolen jewelry to Imperial Jewelers in the past" (App. 7) and who take that burglar to execute a warrant at the jewelry store may claim to have "inadvertently discovered" other items that the burglar identifies as having been stolen. (Id.)

The court of appeals justified its finding that the discovery of non-warrant items had been inadvertent because petitioner had failed to show that the officers knew that "any stolen jewelry not listed in [the] warrant was still at the store or what these particular items were." (App. 7.) The officers, however, had been able to secure a warrant without any showing that stolen jewelry was still at the store; if the "inadvertence" requirement is to have any significance, it should not be available to officers who admit that they brought along third parties to identify non-warrant items.

-III-

This case also present the question, which has received conflicting answers from the courts of appeals, of whether the "substantial preliminary showing" requirement of *Franks v. Delaware*, 438 U.S. 154 (1978) is applicable to civil cases.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Court held that before a defendant in a criminal case could secure a hearing on a challenge to the veracity of a search warrant affidavit, there must be a "substantial preliminary showing," id. at 170, to support "allegations of deliberate falsehood or reckless disregard for the truth." Id. at 171.

The "substantial preliminary showing" is required in criminal cases "to prevent the misuse of a veracity hearing for purposes of discovery or obstruction." *Franks, supra* 438 U.S. 170. There is of course no comparable concern in a civil case.

The circuits are divided about whether this "substantial preliminary showing" is required in civil cases. Compare *Hindman v. City of Paris, Texas,* 746 F.2d 1063 (5th Cir. 1984) (*Franks* not relevant in civil case) with *Krohn v. United States,* 742 F.2d 24, 26 (1st Cir. 1984) (applying *Franks* standard to civil case).

The Seventh Circuit sought to justify incorporation of the *Franks* standard as consistent with "discouraging insubstantial suits against government officials." (App. 4.) The summary judgment procedure of Rule 56 provides an adequate mechanism to resolve insubstantial suits short of trial. Further barriers to the vindication of civil rights claims are not warranted.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

January, 1987

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-2089

BENJAMIN PERLMAN,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, a municipal corporation, WILLIAM DEVONEY and ROBERT TRUSZ,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 1765—**Frank J. McGarr**, *Chief Judge* and
Stanley J. Roszkowski, *District Judge.*

ARGUED MAY 12, 1986—DECIDED SEPTEMBER 10, 1986

Before BAUER, and WOOD, *Circuit Judges*, and CAMPBELL, *District Judge.**

BAUER, *Circuit Judge.* The plaintiff, Benjamin Perlman, sued the City of Chicago and two Chicago police officers under 42 U.S.C. § 1983 for an allegedly illegal seizure of jewelry from plaintiff's jewelry store. The district court granted summary judgment in favor of one of the police officers and a jury returned a verdict in favor of the City of Chicago and the other police officer. Perlman alleges a number of errors on appeal; nevertheless we affirm the rulings of the trial court and the jury's verdict.

* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

I.

On March 25, 1982, Chicago police arrested two suspected burglars, Mary Buckman and Mark Bertucci. Buckman confessed to committing some 100 burglaries, and Bertucci admitted selling articles stolen by Buckman. Bertucci identified Imperial Jewelers, a jewelry store owned and operated by Benjamin Perlman, as an establishment to which he had sold stolen jewelry. On the basis of information provided by Bertucci and Buckman, Officer Robert Trusz of the Chicago Police Department prepared an affidavit to obtain a warrant to search Imperial Jewelers. The warrant was issued authorizing the seizure of a camera and seven items of jewelry.

On March 27, 1982, Officer Trusz and three other police officers, led by Sergeant William Devoney, executed the search warrant. The officers were accompanied by Bertucci and two burglary victims whose jewelry was among the items listed in the warrant. Upon entering the store and serving the manager with the warrant, Sergeant Devoney noticed that no second-hand jewelry dealer's license was displayed. At this time, one of the burglary victims identified several items of jewelry listed in the warrant in a showcase in the front of the store. Sergeant Devoney then asked Perlman if he had any used jewelry in the store. Perlman replied that he kept used jewelry in a safe in the rear of the store and then had one of his employees bring several trays containing the jewelry to the front of the store. While carrying one of the trays, the employee attempted to "palm" one of the rings but was spotted by Sergeant Devoney and ordered to return the ring. One of the burglary victims accompanying the officers later identified the ring as stolen. Six or seven trays were eventually taken from the safe to the front of the store. The burglary victims and Bertucci identified a number of pieces of jewelry as stolen, some of which were listed in the warrant and some of which were not.

As the search wore on, Perlman became increasingly concerned about the disruption to his business the search was causing. Perlman had advertised a sale for that day

and the police did not permit anyone to enter or leave the store while the search was being conducted. Not all of the items listed in the warrant had been found, however, and the trays containing the used jewelry contained nearly one thousand items. In order to resume business, Perlman agreed to allow the officers to take the used jewelry to a police station so that they could inventory each item and attempt to ascertain which items were stolen. Perlman then placed the trays into cases and accompanied the officers to the station, where he sorted and arranged the jewelry. A police technician then photographed the jewelry in Perlman's presence. Perlman and his manager were charged with receiving stolen goods.

The police contacted persons who had filed burglary reports, informed them of the seizure, and displayed the jewelry to them on March 29 and 30, 1982. It appears that some thirty items were identified as stolen by persons who could verify ownership of the items, although the exact number is not clear from the record. A short time later the police held a well-publicized property show-up that was attended by the general public. Again, the record is muddled as to how many items were identified at this show-up; Perlman contends that no items were identified as stolen while the defendants contend that a "substantial" number of items were claimed.

Later that summer, Perlman and the store manager were found not guilty of the charges against them after a bench trial. At the trial's conclusion, the trial court ordered the police to return the pieces of jewelry listed on 61 inventory sheets. After receiving this jewelry, Perlman complained to the police department that a number of the items that had been seized were "missing." The Internal Affairs Division of the police department found that the complaint was groundless. Perlman then filed this suit under 42 U.S.C. § 1983 on March 11, 1983 seeking damages against Officer Trusz for allegedly making deliberate misrepresentations in his warrant affidavit and against the City of Chicago and Sergeant Devoney for the allegedly illegal seizure of the used jewelry.

Prior to trial, Perlman discovered that the police were still holding some jewelry that had not been identified as stolen. The district court ordered the police to return these items to Perlman. After discovery was completed, each party filed a motion for summary judgment. The district court granted summary judgment in favor of Trusz but held that Perlman's claim against Sergeant Devoney and the City of Chicago should go to trial, ruling in part that the defendants may have properly seized some of the non-warrant jewelry under the "plain view" exception to the warrant requirement. A jury then found in favor of the defendants, and Perlman now appeals.

II.

In granting summary judgment in favor of Officer Trusz, the district court held that Perlman failed to overcome the presumption that the warrant affidavit was valid because he did not make a substantial preliminary showing that Officer Trusz made false statements in the warrant affidavit in knowing or reckless disregard of the truth. Order, No. 83 C 1705 (Dec. 17, 1984) (citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978)). The district court therefore granted summary judgment in favor of Officer Trusz. On appeal, Perlman contends that applying the "substantial preliminary showing" requirement of *Franks* is inappropriate in a civil case.

The Supreme Court has expressed a policy of discouraging insubstantial suits against government officials. *See, e.g., Mitchell v. Forsyth*, 105 S.Ct. 2806, 2815-16 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). Noting this policy, the First Circuit applied the "substantial preliminary showing" requirement in a § 1983 action which alleged that a warrant affidavit contained false statements. *See Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984). We believe that this approach to the type of claim before us now sensibly and effectively promotes the policy expressed by the Supreme Court.

Further, we see no reason to apply a standard different than that established by *Franks* to a civil action for damages based on an allegation that a police officer deliberately misrepresented facts in a warrant affidavit. Both the exclusion of evidence in a criminal case and the award of damages against a police officer in a civil case for making deliberate misrepresentations in a warrant affidavit operate to discourage violations of the Fourth Amendment, and the Supreme Court has recently noted that the standards to be applied in a similar context are the same in both civil and criminal actions. *See Malley v. Briggs*, 54 U.S.L.W. 4243, 4245 (March 5, 1986) (standard of reasonableness applied in suppression hearing also defines qualified immunity of police officer in civil action). *See also Olson v. Tyler*, 771 F.2d 277, 282 (7th Cir. 1985) (same). We therefore adopt the First Circuit's position. Accordingly, we hold that the court below properly applied the "substantial preliminary showing" requirement to Perlman's claim against Officer Trusz, and properly granted summary judgment against Perlman for failing to make a substantial preliminary showing that Trusz made false statements in the warrant affidavit in knowing or reckless disregard of the truth.

III.

Perlman contends that the trial judge erred in denying his motion for summary judgment, arguing that the defendants were precluded from asserting that they properly seized the jewelry under the plain view doctrine because of two admissions the defendants made before trial. First, Perlman contends that Sergeant Devoney admitted in a deposition that he knew not all of the jewelry was stolen, but decided to confiscate it all as contraband because of the length of time it would take to go through the large amount of used jewelry they found. Second, Perlman cites a statement in the defendants' response to his motion that the defendants brought Bertucci and the burglary victims with them when they executed the warrant solely to identify non-warrant items. Perlman asserts that, because of

these two admissions, he was entitled to summary judgment as a matter of law.

Under the plain view doctrine, police may seize an item without a warrant if three conditions are met. First, the presence of the police in the area where they observe the item must be lawful. Second, the discovery of the item must be inadvertant. Finally, the criminal nature of the item must be immediately apparent. *Moya v. United States*, 761 F.2d 322, 326 (7th Cir. 1984) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971)). Perlman argues that, at the time the trial judge ruled on his motion for summary judgment, the admissions set forth above conclusively established that the defendants' seizure of the jewelry did not meet any of these three conditions.

Perlman first argues that the defendants admitted that they violated the warrant requirement of the Fourth Amendment by stating in their response to Perlman's motion for summary judgment that they brought along Bertucci and the burglary victims solely to identify non-warrant items. Perlman's argument is supported by *Coolidge v. New Hampshire*, which stated that the Supreme Court "has never permitted the legitimation of a planned warrantless seizure on plain view grounds . . . and to do so . . . would be flatly inconsistent with the existing body of Fourth Amendment law." 403 U.S. at 471 n. 27. The statement in the defendants' unverified memorandum of law, however, is not dispositive of this issue. In a proceeding for summary judgment, the statements in the supporting brief in opposition to the motion do not alone determine the trial court's ruling. *See* 10A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2721 & § 2723 pp. 63-66 (1983) (citations omitted). The trial court must consider all of the materials submitted by the parties, including affidavits or depositions, in evaluating whether an issue of fact exists. *See Marsh v. Austin-Fort Worth Coca-Cola Bottling Co.*, 744 F.2d 1077, 1079 n. 4 (5th Cir. 1984) (per curiam); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 174 (D.C. Cir. 1976). In this case, Sergeant Devoney stated in his deposition that both Ber-

tucci and the burglary victims accompanied the police to aid in identifying items listed in the warrant. In view of this sworn statement, we cannot agree with Perlman's contention that the trial court was required to rule against the defendants as a matter of law because of the unsworn statement in the defendants' memorandum of law.

Perlman further argues that this statement proves that the police did not discover the used jewelry inadvertantly. The inadvertance requirement is not met when "the police know in advance the location of the evidence and intend to seize it." *Coolidge v. New Hampshire*, 403 U.S. at 470. *See United States v. Griffith*, 537 F.2d 900, 903 (7th Cir. 1976) (following *Coolidge*). A mere suspicion by the police that they will discover criminal evidence not listed in the warrant, however, does not preclude a finding that the discovery of that evidence was inadvertant. *United States v. Liberti*, 616 F.2d 34, 37 (2d Cir. 1980) (citing *United States v. Hare*, 589 F.2d 1291, 1294 (6th Cir. 1979); *United States v. Worthington*, 544 F.2d 1275, 1280 n. 4 (5th Cir.), *cert. denied*, 434 U.S. 817 (1977). Notwithstanding the fact that the trial judge was not required to view the admission in the defendants' memorandum as dispositive, we do not find that this admission showed more than a suspicion by the police that stolen jewelry not listed in the warrant was located at Imperial Jewelers. The police knew only that Bertucci had sold other stolen jewelry to Imperial Jewelers in the past, not that any stolen jewelry not listed in warrant was still at the store or what these particular items were. We therefore find that this statement did not preclude a finding that the used jewelry not listed in the warrant was inadvertantly discovered.

Finally, Perlman contends that Sergeant Devoney stated that he knew not all of the used jewelry was stolen, but decided to confiscate it all as contraband because of the length of time it would take to go through it all, and he argues that this proves the defendants could not show that the criminal nature of the used jewelry was immediately apparent. Accordingly, Perlman contends that the

police did not have probable cause to seize the jewelry. In support of this argument, Perlman cites *United States v. Thomas*, 676 F.2d 239, 243-44 (7th Cir. 1980), *cert. denied*, 449 U.S. 1091 & 450 U.S. 931 (1981), which held that the "immediately apparent" requirement is intended to prevent police "from using pretext of 'plain view' to conduct general inventory searches for items that may have a suspect character in a context."

We first note that Sergeant Devoney's statement is somewhat different in its actual form than as paraphrased above by Perlman. In a deposition, Sergeant Devoney was asked why the police took the jewelry not listed in the warrant, and his entire response was as follows:

> Well, one of the main factors to this is that one of the, I believe it was the employee or I don't believe it was his wife, but one of the employees attempted, a woman that was there, attempted to take something from one of the trays and palm it and hide it in her hand and, while the other detectives were going through the cases, this woman had the stuff in her hand. We opened it up, there was property belonging to the victim.
>
> So we suspected, we went through the cases and we found other items in there, like class—there were numerous class rings which we know in our burglary cases that a lot of them are being taken in the burglary because the common thief knows that they are being advertised that they are being bought for $125 a piece, because of the gold content. There was so many of them and other items, we decided that rather than sit there and spend numerous days in checking all of these items out, we would confiscate them as contraband.

Devoney Dep., pp. 10-11. In light of this entire statement, we must reject Perlman's argument because it is similar to the position rejected by the Supreme Court in *Texas v. Brown*, 460 U.S. 730 (1982).

In *Texas v. Brown*, the police seized an uninflated party balloon that was knotted at the open end. The police had observed the balloon on the front seat of the defendant's car and seized it because they knew that such balloons were commonly used to hold drugs. The police had also observed several plastic vials, an amount of loose white powder, and an open bag of party balloons in the glove compartment of the defendant's car before seizing the balloon. The lower court found that the criminal nature of the balloon was not immediately apparent because the police did not know for a certainty that the balloon contained illegal drugs. The Supreme Court disagreed, and upheld the seizure of the balloon under the plain view doctrine because the police had probable cause to believe that the balloon contained illicit drugs. 460 U.S. at 741-42.

The Court stated that in *Colorado v. Bannister*, 449 U.S. 1 (1980), it "did not view the 'immediately apparent' language of *Coolidge* as establishing any requirement that a police officer 'know' that certain items are contraband or evidence of a crime." 460 U.S. at 741. Rather, the court held that the seizure of an item in plain view is reasonable if "there is probable cause to associate the property with criminal activity." *Id.* at 471-72 (quoting *Payton v. New York*, 445 U.S. 573, 587 (1980)). The court then stated that probable cause

> merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," Carroll v. United States, 267 U.S. 132, 162 (1925), that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.

Id. at 742.

In view of these principles, we do not believe that Sergeant Devoney's statement precluded the defendants from relying on the plain view doctrine. First, it is incorrect to say that Devoney admitted he knew that all of the jewelry was not stolen. The import of Devoney's

entire statement is that he could not tell with certainty which items were stolen and which were not, but that he had a suspicion that any or all of the items could be stolen goods. Based on this suspicion, he seized all of the items as contraband. As stated above, Devoney was not required to know for a certainty that all of the items were contraband in order to seize them; he needed only probable cause to associate the items with criminal activity. We therefore examine the facts known to Sergeant Devoney at the time of the seizure, and before the district court on Perlman's motion, to determine whether Sergeant Devoney had a reasonable belief that the jewelry was stolen.

The officers knew that Bertucci had sold stolen jewelry to Imperial Jewelers on a number of prior occasions. Upon entering the store and viewing display cases, Bertucci and one of the burglary victims identified stolen jewelry listed in the warrant. These citizens then identified more stolen jewelry, some listed in the warrant and some not, in the trays of used jewelry Perlman had his employee bring up from the back of the store. The jewelry identified as stolen was intermingled with jewelry of the type that the police knew was commonly stolen in burglaries. Finally, one of the employees was caught attempting to conceal a ring that was contained in one of the trays, and one of the burglary victims identified this ring as her property.[1]

We find that these facts were sufficient to cause a man of reasonable caution to believe that all of the used jewelry

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[1] Perlman repeatedly stressed that the police seized nearly 900 items, but we fail to see the impact that the amount of items seized has on the determination of probable cause in this case. Perlman does not argue that the sheer number of items seized has any significance as to whether the items had been stolen, and we find that the magnitude of the seizure is irrelevant to this issue. During the first six months of 1986, 27,164 burglaries were reported in Chicago, Chicago Tribune, July 27, 1986, § 3, at 3, col. 2., and Buckman alone confessed to some 100 burglaries, so it is not in the least incredible that a single jeweler might possess 900 or more stolen items.

may have been stolen property. We therefore find that there was probable cause to associate this jewelry with criminal activity. Under *Texas v. Brown*, this satisifes the "immediately apparent" requirement.[2] We therefore do not find that Sergeant Devoney's statement precluded the defendants from relying on the plain view doctrine. For the reasons stated above, we affirm the trial court's denial of Perlman's motion for summary judgment.[3]

IV.

Perlman also argues that he was entitled to a directed verdict, contending that the evidence at trial showed the officers seized the jewelry to determine whether it was stolen. This argument implies that the officers had to know for a certainty that each item of jewelry was stolen before they could seize it, but *Texas v. Brown* does not require knowledge that an item is contraband in order to meet the "immediately apparent" requirement of the plain view doctrine. It is enough that the officers had probable cause to associate the jewelry with criminal activity, and we find that this standard was met. Therefore,

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[2] Because we find that this ruling was a proper application of the plain view doctrine, we need not consider the defendants' argument that Perlman consented to the seizure.

[3] We do not believe that this holding is inconsistent with *United States v. Thomas*, 676 F.2d 239 (7th Cir. 1980), *cert. denied*, 449 U.S. 1091 & 450 U.S. 931 (1981), on which Perlman relies. In *Thomas*, this court upheld the seizure of automobile parts from a warehouse under the plain view doctrine, holding that their criminal nature was immediately apparent based on the police officers' knowledge that stolen cars had been driven into the warehouse, cars had been cut apart in the warehouse, and the warehouse contained no equipment for the repair or assembly of cars. The warrant authorized the seizure only of specific stolen autos. This case is similar to *Thomas* in that auto parts, like jewelry, are not inherently criminal in nature like illegal drugs, but their criminal nature may be "immediately apparent" because of surrounding circumstances.

we reject Perlman's argument that he was entitled to a directed verdict.[4]

V.

Finally, Perlman contends that he was entitled to an award of attorney's fees, claiming that the police returned all of the jewelry they seized only after he filed suit, and that therefore the suit was a partial success. The trial judge found, however, that the jewelry returned after this case was filed "could not be attributed with certainty to the filing of the lawsuit," Order, No. 83 C 1705, p.3 (May 28, 1985), and therefore denied Perlman's motion for attorney's fees. We review this finding under the "clearly erroneous" standard. *See Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 569 (7th cir. 1983).

The police returned jewelry listed on 61 inventory sheets to Perlman at the conclusion of his criminal trial. Perlman later complained to the Chicago Police Department that "$40,000.00 worth of jewelry is missing." The Internal Affairs Division of the police department investigated the complaint and found that it was groundless, apparently construing Perlman's complaint as an allegation that the police could not account for some of the jewelry. This conclusion is buttressed by Perlman's first amended complaint, which alleges that "these items were not inventoried following their seizure, but were taken for personal use by police officers." During discovery, Perlman moved the district court to order the return of the remaining jewelry, which had been properly inventoried and was not missing. The police department complied with these orders. The district court found that "[a]lthough the City may have been bureaucratic and recalcitrant in the

[4] Perlman also argues that he is entitled to a new trial based on several allegedly incorrect evidentiary rulings and an allegedly inflammatory closing argument by the City of Chicago. We find that these arguments do not merit discussion and reject them without further comment.

return of the jewelry, it never asserted a claim that it was entitled to keep it. The return of the jewelry, therefore, could not be attributed with certainty to the filing of the law suit." Order, No. 83 C 1705, p. 3 (May 28, 1985). Because Perlman never requested the return of the jewelry before filing suit, we hold that the trial judge's finding was not clearly erroneous.

For the reasons stated above, the trial court's rulings and the jury's verdict are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Nos. 85-2027, 85-2056

BENJAMIN PERLMAN,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

[September 10, 1986]

JUDGMENT — ORAL ARGUMENT

HON. WILLIAM J. BAUER, Circuit Judge
HON. HARLINGTON WOOD, Circuit Judge
HON. WILLIAM J. CAMPBELL, District Judge[1]

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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1. The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Nos. 85-2027, 85-2056

BENJAMIN PERLMAN,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

[October 6, 1986]

ORDER

HON. WILLIAM J. BAUER, Circuit Judge
HON. HARLINGTON WOOD, Circuit Judge
HON. WILLIAM J. CAMPBELL, District Judge[1]

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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1. The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BENJAMIN PERLMAN,

Plaintiff

No. 83 C 1705 *v.*

CITY OF CHICAGO,
ROBERT TRUSZ and
WILLIAM DEVONEY,

Defendants.

Memorandum Opinion and Order
[December 18, 1984]

ROSZKOSWKI, District Judge:

Before the court are defendants' motion for partial summary judgment and plaintiff's cross-motion for partial summary judgment. For the reasons set forth herein, defendants' motion for partial summary judgment is granted. In addition, plaintiff's cross-motion for partial summary judgment is denied.

BACKGROUND

Plaintiff Benjamin Perlman owns and operates "Imperial Jewelers," a retail jewelry store in Chicago, Illinois. On March 26, 1982, defendant, Robert Trusz, a Chicago police officer, sought the issuance of a search warrant naming seven specific items of jewelry believed to be in the possession of the plaintiff at Imperial Jewelers. In the warrant affidavit, Trusz based probable cause for the search on alleged statements made by two suspects, Mark Bertucchi and Mary Buckman, arrested in connection with a recent series of burglaries in the area. Buckman had confessed to the burglaries in which the subject seven items were stolen.

Buckman also told the police that she had given some of the stolen items to Bertucchi. Bertucchi, in turn, admitted receiving certain items from Buckman and told the police that on several occasions he had sold these items to either the plaintiff or to Doulin, one of plaintiff's employees at Imperial Jewelers.

On the basis of Trusz' affidavit, a magistrate issued a warrant authorizing the search of Imperial Jewelers for the seven subject items. Trusz, along with several other officers, Bertucchi and one of the burglary victims, then went to Imperial Jewelers to execute the warrant. In the course of the search, several of the items named in the warrant were seized. The officers also seized additional items that either Bertucchi or the burglary victim alleged to be stolen. In addition, the officers also seized a large number of other items. In total over 900 items of jewelry were seized.

As a result of the search, Perlman and Doulin were indicted and charged with four counts of theft. Because of the number of items seized, the police authorized a property show-up to allow burglary victims to claim any items that were stolen from them. The property show-up was broadcast on WMAQ-TV and resulted in items being returned to ten victims.

Prior to trial, Perlman filed a pretrial motion requesting the return of all seized property that was not named in the warrant. At the hearing on Perlman's motion, a state court judge rejected claims by the prosecution that all of the items seized were needed to complete an ongoing police investigation. Noting that the police had been in possession of the items for almost thirty days, the judge ordered all of the items impounded until a hearing could be held to determine

which items the police could continue to hold. Subsequently, however, Perlman and the prosecution entered into an agreement in which the police agreed to return approximately 90% of the seized items, holding the remainder for further investigatory purposes.

The state criminal trial against Perlman and Doulin lasted less than twenty minutes with each side presenting only two witnesses. Trusz and another officer who participated in the search testified for the prosecution and both Perlman and Doulin testified on their own behalf for the defense. At the completion of the testimony, the state trial judge, sitting without a jury, found both Perlman and Doulin innocent of all charges.

Plaintiff now brings a two count suit under 42 U.S.C. §1983 (1982) (hereinafter "§1983") for damages suffered as a result of alleged violations of his Fourth Amendment rights. In Count One, plaintiff seeks money damages from officer Trusz for allegedly making misrepresentations in his warrant affidavit in order to mislead the magistrate. In Count Two, plaintiff seeks money damages from Devoney and the Chicago Police Department for injuries resulting from the seizure of items not named in the warrant.

Defendants' now move for partial summary judgment pursuant to Fed.R.Civ.P. 56 on the question of the validity of the warrant and the seizure of the items named therein. Defendants' motion is aimed at Count One of plaintiff's amended complaint. Plaintiff has also moved for partial summary judgment on the question of whether he was deprived of his Fourth Amendment rights when the officers seized items not named in the warrant. Plaintiff's cross-motion involves Count Two of his amended complaint.

DISCUSSION

I. Validity of the Search Warrant

A. Preclusion of the Issue

The defendants' put forth several arguments in support of their motion for partial summary judgment. The defendants' first argue that, because the plaintiff did not raise the validity of the warrant as an issue in the prior state criminal proceeding, he is estopped from raising it now. In determining whether *res judicata* or collateral estoppel precludes relitigation of an issue, the Supreme Court has made it clear that a federal court must grant the same preclusive effects to a state court judgment as the state itself would. *Haring v. Prosise,* ___U.S.___, 103 S.Ct. 2368, 2372 (1983). In the instant case, therefore, Illinois law determines the effect of the prior state proceedings on plaintiff's current §1983 action.

1. Res Judicata Under Illinois law, once a cause of action has been adjudicated by a court of competent jurisdiction, *res judicata* prohibits that cause of action from being relitigated in a subsequent action between the same parties. *Workmen's Lumber & Construction Co. v. Martin,* 121 Ill.App.2d 352, 257 N.E.2d 494, 496 (1970). This preclusion applies not only to matters which were actually litigated in the prior proceeding, but also to all matters which could have been raised. Id. at 355, 257 N.E.2d at 496. *Res judicata* will cause a prior adjudication to be conclusive as to a subsequent action only if the two suits share the same essential elements. Specifically, each of the following elements must be the same in both suits: (1) the parties of their privies, (2) the cause of action, and (3) the subject matter. Id.

In the instant case, the parties are clearly not the same. In the state proceeding, Illinois, on behalf of its citizens, brought suit against Perlman and Doulin. In the current §1983 action, Perlman is bringing suit against two Chicago police officers, the Chicago police department, and the City of Chicago. The citizens of Illinois are clearly not in privy with the City of Chicago, its police department, or any of its police officers. The parties or their privies, therefore, are not the same in both suits. Thus, *res judicata* cannot serve as a basis for barring the plaintiff's present action.

2. *Collateral Estoppel* Collateral estoppel is similar to res judicata in that, under certain circumstances, a prior adjudication may preclude a subsequent action between the same parties or their privies. *Workmen's Lumber & Construction Co., supra,* 121 Ill.App.2d at 355-56, 257 N.E.2d at 496. Unlike *res judicata,* however, collateral estoppel only acts to preclude particular issues actually litigated between the parties; collateral estoppel is inapplicable to issues which might have been raised but were not. Id. Thus, collateral estoppel will only act to preclude relitigation of issues actually adjudicated in a prior proceeding between the same parties or their privies.

In the instant case, the validity of the warrant was never raised, much less litigated, in the state trial. In the pretrial hearing, the plaintiff based his request for the return of

items seized on general equitable grounds. (Plaintiff's Exhibit 18, 6-7) [1] Moreover, the plaintiff did not raise any Fourth Amendment issues during his state criminal trial. (Plaintiff's Exhibit 23.) Therefore, doctrine of collateral estoppel cannot serve to bar the plaintiff's present §1983 action.

B. Waiver

The defendants' next argue that the plaintiff stipulated to the validity of the warrant in the state trial and, as a result, has waived his right to raise the issue now. The state trial record, however, makes it clear that the parties did not enter into any such stipulation. While the prosecution did suggest a broad stipulation on the validity of the warrant, the plaintiff declined; instead, the parties stipulated to the return of certain items. (Plaintiff's Exhibit 23, 4-5.) Such a narrow stipulation hardly constitutes a stipulation as to the validity of the warrant. Thus, plaintiff has not waived his objection to the validity of the warrant.

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1. The plaintiff argued that the police had already held the seized goods for almost thirty days and that any further delays in their return would force him out of business. (Plaintiff's Exhibit 18, 7.) The state trial judge rejected the prosecution's contention that the seized goods were needed for further investigation and ordered all of the seized goods to be brought in for a hearing to decide which goods the police could continue to hold. (Plaintiff's Exhibit 18.) As a result of this hearing, the two parties entered into an agreement for the return of approximately 90% of the seized goods. (Plaintiff's Exhibit 19, 2).

C. Substantive Validity

Defendants' attempt to limit this court's inquiry solely to the facial validity of the instant warrant. Contrary to defendants' contention, however, there is a difference between attacking the facial sufficiency of a warrant and the integrity of its underlying affidavit. Any doubts concerning this issue were put to rest by the Supreme Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978). In *Franks*, the court reasoned that the warrant clause of the Fourth Amendment "would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." Id. at 168. Therefore, the Court held that the veracity of the underlying affidavit may be attacked notwithstanding the facial sufficiency of the warrant.[2] Id. at 164-65.

The *Franks* court also held that the affidavit supporting a warrant would be presumed to be valid. Id. at 171. In order to overcome this presumption, the party challenging the affidavit must make a substantial preliminary showing that: (1) false statements were made in knowing or reckless disregard of the truth; and, (2) the false statements were necessary to the finding of probable cause. Id. at 171-72. The court in *Franks* also made it very clear that, with respect to the first

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2. Thus, even if the plaintiff had stipulated to the facial validity of the warrant, he would still not be barred from attacking the underlying affidavit as he is now attempting to do.

element, an officer's mere negligence would not suffice. Id. at 171.

In the instant case, the plaintiff has not met his burden of making a substantial preliminary showing that any alleged false statements made in the affidavit by officer Trusz were made in knowing or reckless disregard of the truth. Plaintiff's entire argument rests on the fact that one of the informers upon who's statements officer Trusz' affidavit was based was released due to a lack of evidence on the day after the warrant was issued. In particular, plaintiff points to allegations in Trusz' affidavit that the informer, Bertucchi, had "admitted" to receiving goods taken in burglaries by Buckman and admitted to selling the goods to Doulin at Imperial Jewelers. Plaintiff also points to further allegations purporting to show both Bertucchi and Doulin knew the goods were stolen at the time of the sales.

Plaintiff appears to be arguing that, if the statements accorded Bertucchi were actually made, he would have been charged in connection with selling the stolen goods; since he was not charged, however, plaintiff contends Trusz must have lied or misrepresented Bertucchi's actual statements. The latter conclusion, however, does not necessarily follow from the former proposition. There are numerous reasons why the police or district attorney may have chosen not to charge or prosecute Bertucchi. Indeed, since the person who gave Bertucchi the subject items admitted they were stolen, probable cause existed regardless of whether Bertucchi realized the goods he sold to the plaintiff and his agent were stolen. The court, therefore, refuses to infer that simply because Bertucchi was released he did not inform officer Trusz that he had sold stolen items to the plaintiff or Doulin.

The plaintiff has failed to make a substantial preliminary showing on the first element of the *Franks* test. Since the plaintiff has failed to make a substantial preliminary showing, the Fourth Amendment does not require a hearing on the validity of the affidavit. *United States v. Reed*, 726 F.2d 339, 341 (7th Cir. 1984). Defendants' motion for partial summary judgment on the validity of the warrant and its underlying affidavit is, therefore, granted. Thus, the court need not consider the second element of the *Franks* test.

II. The Seizure of Items Not Identified in the Warrant

In his cross-motion, plaintiff requests partial summary judgment against Officer Devoney and the City of Chicago for violations of his Fourth Amendment rights based upon the seizure of items not described in the warrant. Defendants respond that additional seizures was justified under the "plain view" doctrine, and that the application of that doctrine requires a factual determination.

In the instant case, Devoney admits to directing the seizure of items not described in the warrant. (Devoney Dep. 9) In the deposition, Devoney admitted he did not believe all of the seized items were stolen, stating: "[t]here were so many rings and other items, we decided that rather than sit there and spend numerous days in checking all of those items out, that we [would] confiscate them as contraband." (Devoney Dep. at 13) It is also undisputed that, under Devoney's direction, over 900 items were seized.

In the view of this court, it would be impossible to analyze the application of the "plain view" doctrine absent a trial on the merits. Based upon the present record, it is

unclear which, if any, of the additional 900 seized items were identified by the informer or victim accompanying Officer Devoney. *People v. Superior Court of Marin County,* 157 Cal. Rptr. 716, 598 P.2d 877, 881 (1979); *State v. Scigliano,* 120 Ariz. 6, 583 P.2d 893 (1978) (En Banc.); see also *Commonwealth v. Farrah,* 413 A.2d 1094, 1099 (Pa. 1980), or which, if any, of the additional 900 items were seized after the seven items identified in the subject warrant were located. *United States. v. Schire,* 586 F.2d 15, 17 (7th Cir. 1978). Moreover, it is unclear whether Officer Devoney claims the discovery of these additional items was inadvertent or whether there were any additional items, not identified by the informer or victim, whose condition, packaging or other characteristics made it immediately apparent they were stolen. Id.; *Texas v. Brown,* ___U.S.___, 103 S.Ct. 1535 (1983); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); see *also Hall, Search and Seizure,* §§3.13-3.14 (1984) and LaFave, *Search and Seizure,* [6.7(b) and (c) (1984). While the parties have not briefed the merits of defendant's "plain view" contention, it is clear from the preceeding cases, that each of these factual issues could justify some of the additional seizures. While the plaintiff is undoubtedly entitled to judgment concerning some of the subject 900 items, it is impossible to tell which ones from the present record. Moreover, a trial on the merits would be necessitated on the issue of damages alone. Thus, rather than render an advisory opinion on a question which the parties have failed to fully address, the court simply denies the plaintiff's cross-motion for summary judgment.

CONCLUSION

For the reasons set forth herein, defendants' motion for partial summary judgment is granted and plaintiff's cross motion for partial summary judgment is denied.

THE CIRCUIT COURT OF COOK COUNTY

The People of the State of Illinois to all peace officers of the state.

SEARCH WARRANT

On this day Detective Robert TRUSZ #14551, Chicago Police Department, Complainant, has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search William E. DOULIN

and IMPERIAL JEWELRY STORE, 537 West Diversey Avenue, Chicago, Illinois and seize CANON brand camera, model #AE-1, serial #108742F with a lens # 709 523; a LANE TECHNICAL HIGH SCHOOL ring, class of 1961, inscribed "W.C.; a SHURZ HIGH SCHOOL ring, class of 1979, inscribed "TERRY TERSAK"; a wedding ring and engagement set, interlocking, in silver color with a center diamond and side diamonds; a gold [14kt] chain in herring band style with a heart shaped charm; a pearl ring silver in color; a white-gold ring with a blue star sapphire and a string of pearls.

which had been used in the commission of or which constitute evidence of the offense of Burglary and theft [possession of stolen property]

I further command that a return of anything so seized shall be made without unnecessary delay before me or before Judge McCOLLUM or before any court of competent jurisdiction.

/s/ *Michael Close*

Judge

THE CIRCUIT COURT OF COOK COUNTY

COMPLAINT FOR SEARCH WARRANT

Detective Robert Trusz #14551, Chicago Police Dept. Complainant now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search (the person of William E. DOULIN M/W, app. 38 years old, approximately 5'11" and 160# and IMPERIAL JEWELRY STORE, 537 West Diversey Ave., Chicago, Illinois and seize the following instruments, articles and things: CANON brand camera, model #AE-1, serial #108742F with a lens # 709 523; a LANE TECHNICAL HIGH SCHOOL ring, class of 1961, inscribed "W.C.; a SHURZ HIGH SCHOOL ring, class of 1979, inscribed "TERRY TERSAK"; a wedding ring and engagement set, interlocking, in silver color with a center diamond and side diamonds; a gold [14kt] chain in herring band style with a heart shaped charm; a pearl ring silver in color; a white-gold ring with a blue star sapphire and a string of pearls which have been used in the commission of, or which constitute evidence of the offense of BURGLARY and Theft (possession of stolen property).

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above:

On 5 March 1982, a burglary was committed at 190 West Patterson Avenue, Chicago, Illinois, 2nd floor, the residence of William and Lillian CARRERA and was reported under RD# D-073-165. The above itemized articles as well as an 18" yellow metal chain of 14 kt gold in herring bone design, have been enumerated by the victims, the CARRERAs as having been stolen in that burglary.

On 25 March 1982, Mary B. BUCKMAN and Mark J. BERTUCCI were arrested for an attempted burglary of the residence of Joe DANIEL, at 1912 West Nelson Avenue, Chicago, this arrest was made by the Police immediately after the crime occurred and both suspects were identified by witnesses and placed under arrest. Both BUCKMAN and BERTUCCI were fingerprinted.

In comparing the fingerprints of the arrestees BUCKMAN & BERTUCCI, against latent prints recovered from crime scenes, a positive comparison was made between Mary BUCKMAN's prints and some recovered inside a burglarized residence at 1936 West Nelson Avenue, Chicago. That burglary is recorded under RD# D-080-567 and occurred on 12 March 1982.

A line up was conducted, in which Mary BUCKMAN stood with like looking suspects and was positively identified as having proceeds of that burglary on her person. When Mary BUCKMAN was afforded her MIRANDA rights and was advised of the fact that her fingerprints were found in a burglarized residence and the results of the lineup, she confessed to having committed the burglary and that she has pants on at this time that she stole in that burglary. She further related that she took a large quantity of jewelry from that burglary site as well as a .25 cal. BROWNING brand automatic pistol.

Miss BUCKMAN stated that she gave the gun as well as a SHURZ HIGH SCHOOL ring (class of '79, inscribed "TERRY TERSAK"); a wedding and engagement set which interlocked and had a center diamond with side stones and set in silver colored metal; a gold necklace app. 16" with a heart shaped charm; a pearl ring set in silver; a white gold ring with a blue star sapphire, at least one string of pearls and other miscellaneous jewelry which was stolen from the burglary at 1936 West Nelson; all to her boyfriend Mark BERTUCCI to sell.

After being afforded his rights per MIRANDA, Mark BERTUCCI confirmed that Mary BUCKMAN had given him the BROWNING automatic pistol and the just mentioned jewelry which she stole from the residence at 1936 West Nelson. He stated that he had the BROWNING automatic pistol § that BROWNING automatic pistol was recovered and inventoried at Area 6, Detective Division, under Evidence & Recovered Property $836 263. Then when asked were the jewelry that was taken in that burglary at 1936 West Nelson was, he stated that he had sole the SHURZ

HIGH SCHOOL ring '79 inscribed "TERRY TERSAK" and all the aforementioned jewelry taken in that burglary at 1936 West Nelson which was given to him by Mary BUCKMAN and which he knew she had taken in burglary; to Mr. William E. DOULIN (M/W, app. 38 years old, app. 5'11", of IMPERIAL JEWELERS at 537 Diversey, who bought the items, gave cash and receipt for it.

An interview with Marlene PERSAK of 1936 West Nelson corroborated that the jewelry and handgun which Mary BUCKMAN admits stealing and which Mark BERTUCCI admits receiving and disposing of, was in fact items stolen from the residence. The victim PERSAK further stated that some of these items had been hers for as long as 25 years and that she would be able to identify items if given an opportunity.

Miss BUCKMAN and Mr. BERTUCCI were asked by Detectives if they had committed any other burglaries or had any other stolen property, and if they knew of the location of any other stolen property. Mary BUCKMAN responded that she had committed numerous other burglaries, but was presently unable to give any locations of the occurrences. One burglary which she remembered was at 1747 West Columbia. Miss BUCKMAN was in fact picked out of a lineup by a witness to the 1747 West Columbia burglary, as one offender going into the house at the time of the burglary. Among the items stolen by her in the burglary was a gold wedding ring, which Miss BUCKMAN says she gave to Mark BERTUCCI to sell.

Mark BERTUCCI acknowledged receiving the gold wedding ring from Miss BUCKMAN, as well as other proceeds from that burglary at 1747 West Columbia (Police RD# D-087-427) and selling that gold ring to IMPERIAL JEWELRY STORE at 537 West Diversey. Mark BERTUCCI related that at the time he sold the gold ring to William E. DOULIN of IMPERIAL JEWELRY STORE, he received a receipt, such as receipts he received on numerous other occasions when he sold burglary proceeds to that store.

Mark BERTUCCI was able to supply the Detectives with four receipts which he had received from IMPERIAL JEWELERS on occasions which he sold quantities of jewelry to that store. Copies of those four receipts are attached to this complaint.

In additional conversation, Miss BUCKMAN recalled stealing a CANON brand camera, model #AE1, and a LANE TECHNICAL HIGH SCHOOL, class of '61. Detectives located the report of this burglary and found it to be located at 1919 West Patterson Avenue, Chicago and filed under RD #D-073-165. The facts in the investigated corroborate the statement of Miss BUCKMAN, as the loss included a CANON brand camera, model #AE-a, serial #108742P and a LANE TECHNICAL HIGH SCHOOL ring (class of '61, initialed MC). Miss BUCKMAN again reiterated that she gave these items to Mark BERTUCCI to sell for her. He, Mark BERTUCCI, acknowledged that he received the camera and ring which were proof of his burglary at 1747 West Columbia and that he had sold the camera and LANE TECH ring to Mr. DOULIN of IMPERIAL JEWELERS of 537 West Diversey.

In conversation with Mark BERTUCCI, he related that he would take the jewelry which Miss BUCKMAN would take in burglaries, to IMPERIAL JEWELERS and sell it to Mr. DOULIN, the next day that the jewelry store would be open. Mr. BERTUCCI related that when he sold the items from the above mentioned burglaries, as well as when he sold burglary proceeds from other burglaries to Mr. DOULIN, Mr. DOULIN would ask him if the items were from a burglary in the neighborhood or from a burglary far away from the store. Mr. DOULIN would ask if it would be safe to display the jewelry for sale in IMPERIAL JEWELRY store, or whether he should dispose of it in another manner or as scrap.

Mr. BERTUCCI related that in the case of the above mentioned jewelry and in other cases where he sold stolen jewelry to Mr. DOULIN of IMPERIAL JEWELERS, he told Mr. DOULIN that that items were taken nowhere in the neighborhood and that it would be safe for Mr. DOULIN to display the items for sale in his store.

Based on the above facts, the undersigned Detective believes that a search of the aforementioned IMPERIAL JEWELRY STORE and THE PERSON of William DOULIN, will produce items taken in the burglaries mentioned above which are itemized above.

/s/ *Robert Trusz*

COMPLAINANT

Subscribed and sworn to before me on 26 March 1982.

/s/ *Michael Close*

JUDGE